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ALEXANDER L. STEVAS,

No. 81-1022
IN THE

Supreme Court of the United States

October Term, 1981

PRESS-ENTERPRISE COMPANY, and COPLEY PRESS, INC.,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GEORGE WAYNE SMITH, CHRISTOPHER GREGORY HARVEN, RUSSELL AARON HARVEN,
Defendants.

Brief in Opposition to Petition for Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One.

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Questions Presented.

1. Is the issue presented by the trial court's decision to close the jury voir dire examination to the public moot when a hearing was held pursuant to the procedural safeguards of *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814?

2. Did the application by Respondent Court of the rationale of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, to close the jury voir dire examination in this case to the public, fall within the ambit of the procedural safeguards enunciated by this Court in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814, for the protection of the public's right to attend criminal trials?

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Brief in Opposition to Petition for Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One.

Jurisdiction.

The questions presented by Petitioners are moot and no actual controversy is present which would involve the jurisdiction of this Court under Article III of the Constitution of the United States.

Constitutional Provisions Involved.

United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Statement of the Case.

Respondent agrees with Petitioners' Statement of the Case, which appears at pages 5 and 6 in their Petition, except to add the following facts:

The selection of twelve jurors and eight alternate jurors in the case of *People of the State of California v. Smith*,

et al., began in July, 1981, and was concluded in mid-December, 1981, a period of more than five months, during which more than 240 venirepersons were interviewed. These voir dire examinations resulted in the production of a reporter's transcript some 18,000 pages in length.

REASONS FOR DENYING THE WRIT.

I.

The Matter Presented by Petitioners Is Moot.

The fact that the jury selection process has been completed and the jurors and alternate jurors sworn in the criminal trial from which the Petition arises, renders moot the questions Petitioners seek to present. Therefore, as to the jury selection process in this case, no justiciable controversy presently exists nor is there any "actual controversy" which could by a judgment of this Court be carried into effect (see *Mills v. Green* (1895) 159 U.S. 651, 653, 40 L.Ed. 293, 16 S.Ct. 134.)

Petitioners seek to have this Court review what is at best an abstract proposition of law and seek to have this Court declare principles or rules of law which can no longer affect the case before it. (See *Mills, supra,* 159 U.S. at 653.)

Thus, the question upon which review is sought is outside the mandate of justiciability and the jurisdiction of this Court according to Section 2 of Article III of the United States Constitution. Moreover, it must be considered that in their citation of the Sixth Amendment to the United States Constitution, Petitioners lack standing to assert the Sixth Amendment right belonging to a criminal defendant. (*Gannett Co. v. De Pasquale* (1979) 443 U.S. 368, 379-381, 61 L.Ed.2d 609, 99 S.Ct. 2898.)

II.

This Court Has Previously Determined That the Right of the Public to Open Trials Is Not Absolute.

Respondent agrees that the United States Constitution guarantees the right of the public to attend trials. Petitioners appear to have overlooked that that right is not absolute and that it must be balanced on a case-by-case basis with con-

flicting and competing rights of criminal defendants. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814.) The crucial consideration herein is according to what standards and under what circumstances the public's right may be limited.

The Court in *Richmond* left that determination in the hands of the trial judge, subject to certain procedural safeguards.

It seems reasonable that an appellate court would scrutinize a case where an entire trial was closed to the public in an effort to protect the public and the defendant from the spectre of secret trials. The instant case, however, does not involve a secret trial in any sense of that phrase, but concerns an effort by the trial court to guarantee a fair and impartial jury for the benefit of the defendants as well as the plaintiff.

The *Richmond* decision emphatically does not preclude the closure of a criminal trial to the public. Moreover, the Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, approved by the Judicial Conference of the United States on September 25, 1980, in reviewing *Richmond*, concluded that there was a right to the closure of a criminal trial in whole or in part to be done at the discretion of the trial court on a case-by-case basis. (87 F.R.D. 519.)

Turning to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, the philosophy of that case is expressed in its statement that ". . . trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." (*Hovey, supra*, 28 Cal.3d at 81.)

Hovey reaffirms the criminal defendant's right to a fair trial, in part, by the sequestration of prospective jurors so

as to permit them to be examined out of the presence of other prospective jurors. The rationale underlying *Hovey* is two-fold: (1) prospective jurors will be more candid in their responses to voir dire examination outside the presence of other prospective jurors; and (2) prospective jurors tend to be influenced by the responses and comments of other prospective jurors during voir dire examination.

It is noted that no part of *Hovey* speaks of excluding the public from the jury voir dire examination or any other phase of a criminal trial. In fact, the California Supreme Court recognized that public right when it stated "This rule will not in any way affect the open nature of a trial." (*Hovey, supra,* 28 Cal.3d at 80-81.) *Hovey* carefully limits the sequestration mandate to criminal cases having death penalty potential and only then, to sequestration of prospective jurors from one another (and not the public) during questions dealing with issues other than those traditionally inquired into at any criminal trial. While the Respondent Court, by closing the entire jury voir dire examination to the public, may have gone a step beyond the letter of the *Hovey* mandate, it did so in an effort to satisfy the *Hovey* rationale. And it did so within the ambit of the procedural safeguards outlined in the *Richmond* case.

The considerations expressed in *Hovey* are highly relevant to the criminal trial in the case underlying the instant Petition. That case involves three defendants who potentially face the death penalty and accordingly, an unusually lengthy jury selection process involving an unusually large number of venirepersons. Because of these factors, persons (then) not yet even called to serve on venirepanels could have read in newspapers and been influenced by the comments and responses of other prospective jurors. Individuals reading such news items could then eventually become venirepersons. Due to the nature of this particular criminal case, such

exposure on the part of potential venirepersons would clearly have defeated the philosophy underlying *Hovey*, of avoiding influences which might affect the outcome of the criminal trial. (See *Richmond, supra*, 448 U.S. at 564.)

III.

This Court Has Previously Set Forth a Three-Pronged Standard Which Must Be Fulfilled by Trial Judges in Order to Avoid Arbitrary Closures of Trials.

Although not specifically so denominated, this Court in *Richmond* set forth a three-pronged standard to be fulfilled by a trial court before closure of the whole or any part of a criminal trial could be allowed. That standard, if so fulfilled, functions as a procedural safeguard of the public's right to access to trials. Articulated in its essence, the standard consists of the following three elements:

(1) That a hearing be held on the contemplated closure pursuant to which the trial court makes findings on the record to support such contemplated closure;

(2) That, in the course of that hearing, alternative solutions which might meet the need to ensure fairness be considered by the trial court; and,

(3) That the trial court specifically recognize the constitutional right of the public to attend the trial. (See *Richmond, supra*, 448 U.S. at 580-581.)

IV.

No Justiciable Legal Question Is Presented by the Petitioners, but Rather a Question of Factual Compliance With the Three-Pronged Standard Previously Set Forth by This Court.

In the criminal case underlying *Richmond*, the public's access to the trial was denied totally and arbitrarily. In the criminal case underlying the instant Petition, the public was

denied access only to the voir dire portion of the trial, and then *only* after the trial court had carefully considered and applied the *Richmond* safeguard. Verbally and in open court Respondent Court fulfilled the three-pronged standard set forth therein, in a hearing strictly for that purpose, which itself produced some seventy-one pages of reporter's transcript.

Conclusion.

Petitioners voice their concerns at the alleged "chipping away of the public's right to attend trials" (Petition, p. 14) and at what they perceive to be the future extension of trial closures with not only the loss of the public right but a loss of public confidence in a system designed to serve the public.

Respondent submits these fears are unwarranted in view of the three-pronged standard already set forth by this Court in *Richmond* and the practical application of that standard by the Respondent Court in this case in carrying out the rationale of *Hovey*.

For these and the other reasons stated herein, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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